Ngui & another (Suing as the administrators & legal representatives of the Estate of Harrison Ngui Musau (Deceased)) v Afreen Enterprises Ltd & another (Civil Case E005 of 2021) [2024] KEHC 1817 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1817 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL CASE E005 OF 2021

TM MATHEKA, J

FEBRUARY 23, 2024

BETWEEN

MARY GATHONI NGUI ..... 1ST PLAINTIFF

SHEILA MWOGELI NGUI ..... 2ND PLAINTIFF

SUING AS THE ADMINISTRATORS & LEGAL REPRESENTATIVES OF THE ESTATE OF HARRISON NGUI MUSAU (DECEASED)

AND

AFREEN ENTERPRISES LTD ..... 1ST DEFENDANT

MOSES KINGEE KARAU ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiffs instituted this suit via a plaint dated 15th November 2021 and filed on 20th November 2021. It is the plaintiffs' case that the cause of action arose from a road traffic accident which occurred on 15th June 2021 at about 6.30pm along the Nairobi-Mombasa Highway at Salama shopping center area.

2. The plaintiffs averred that the deceased was lawfully driving his Toyota Land Cruiser Station Wagon Registration No. KBC 555U) when the 2nd defendant being the 1st defendant's driver, agent and/or servant, so negligently and or carelessly drove motor vehicle Registration No. KCH 215 G/ZF 4201 that it rammed head on into the deceased's motor vehicle causing his death on the spot.

3. The plaintiffs averred that the 2nd defendant (the driver) was negligent by;

    a. Driving the Shacman Truck on the wrong side of the road.

    b. Driving the Shacman Truck at an excessive speed in the circumstances.

c. Failing to stop, swerve, slow down or in any way control the said motor vehicle so as to avoid a collision with the deceased motor vehicle.

d. Failing to keep any proper lookout or have sufficient regard for other road users and in particular, the deceased's motor vehicle.

e. Failing to adhere to the provisions of the *Traffic Act*, Traffic Rules and the Highway Code.

f. Recklessly overtaking at a High Speed.

g. Failing to apply brakes sufficiently in time or at all, to avoid colliding with the deceased Motor Vehicle.

4. They averred that the deceased was 53 years old, full of life, enjoyed good health and was expected to lead a normal and long life. It was also their averment that he had a successful political career and was serving as a Member of County Assembly (MCA) for Makueni County. That as a result of his untimely death, his estate suffered loss and damage for which they are now seeking compensation.

5. The plaintiffs pray for judgment against the defendants jointly and severally for;

a. Damages under the *Law Reform Act* (CAP 26) Laws of Kenya and the *Fatal Accidents Act* (CAP 32) Laws of Kenya.

b. Special damages at Kenya Shillings Two Million, Seven Hundred and Ninety-Five Thousand, Two Hundred and Thirty-Five Only (Kshs. 2,795,235/-)

c. Punitive and Exemplary Damages.

d. Costs of this Suit

e. Interest on a, b, c and d above at court rates until payment in full.

6. The defendants filed a joint statement of defence on 14th February 2022, in which they denied each and every allegation against them as set out in the plaint and put the plaintiffs to strict proof thereof. They averred that the accident was caused by negligence on the part of the deceased which they particularized thus;

a. Driving his motor vehicle at excessive speed in the circumstances.

b. Failing to be attentive in his driving.

c. Driving his motor vehicle recklessly in the circumstances.

d. Being generally careless.

7. They averred that their driver was lawfully driving along Mombasa road and upon establishing that it was safe to overtake, just as he started to overtake, the deceased came driving from the opposite direction at a very high speed and without care rammed head on to the Shacman truck

8. The plaintiffs replied to the defence and joined issues with the defendants on all the allegations in the defence save for the admissions.

9. After the preliminaries, the suit proceeded for hearing before Dulu J who heard all the witnesses. The plaintiffs called two witnesses and the defendants called one witness.

The plaintiff's case

10. PW1 was Mary Gathoni Ngui adopted her statement dated 15th November 2021 as her evidence-in-chief. She testified that the deceased was her husband and they had four children aged 26, 23, 19 and 11 years respectively She testified that she was a trained counselor and had been unemployed since 2018 and the deceased was their sole breadwinner. She testified that the deceased's net monthly salary as an MCA was Ksh 500,000/=. That prior to his political career, the deceased worked at NCBA Bank Kenya Ltd where his net monthly salary was Ksh 300,000/=. She also adopted her list of documents as P.Ex 1-16 as follows;

    a. A copy of police abstract dated 29th June 2021

    b. A copy of post-mortem form dated 16th June 2021

    c. A copy of death certificate

    d. A copy of NTSA Certificate of examination and test for the Land Cruiser.

    e. A copy of letter dated 14th July 2021 from the Loans Management Committee of the County Assembly of Makueni on the deceased's car loan.

    f. A copy of the deceased's Committee Memberships at the County Assembly of Makueni as at March 2020.

    g. A copy of a letter from the chief.

    h. Copies of receipts for funeral expenses.

    i. A copy of receipt for legal fees for petition for grant of letters of Administration.

    j. Limited grant of letters of administration Ad Litem dated 24/09/2021.

    k. A copy of the deceased's marriage certificate.

    l. Copies of birth certificates of the deceased's children.

    m. Copies of fee structures for the deceased's dependants.

    n. Copy of records for the Shacman Truck.

    o. Copy of official search (CR 12) of the 1st defendant. Afreen Enterprises Ltd.

    p. Demand letter dated 21st July 2021.

11. Further, she adopted her supplementary list of documents which contained a Certificate of Electronic Record as P.Ex 17.

12. On cross examination, she confirmed that she did not witness the accident and that all her children except one had attained the age of majority. She reiterated that the deceased earned Ksh 500,000/= per month but conceded that she had not availed his payslip in court. She could not confirm whether the deceased died on the spot but stated that he was not taken to hospital before death. She stated that she was unemployed and that the court had given her a partial grant in order to access some of the deceased's assets.

13. PW2 was Chief Inspector Julius Kiplimo Koech, in charge of Traffic at Salama Police Station. He testified that on 15th June 2021 at 18.30 hrs, an accident occurred at Kona Mbaya along the Nairobi-Mombasa highway involving motor vehicles KCH 215G and KBC 555U. He testified that the KCH

trailer was from Nairobi direction and was overtaking a line of motor vehicles when it collided head on with KBC 555U. As a result, the driver of the Toyota Prado, Harrison Musau-MCA Kibwezi West Constituency, died on the spot. There was also a female adult identified as Hope Mutie Kalunda on board. They transferred the deceased's body to Montezuma Funeral Home in Machakos County for preservation and autopsy.

14. Further, he testified that the lorry driver disappeared without a trace after the accident. He said that he was away when the accident happened but he sent his officers who went to the scene and found that the body had been taken to Machakos. Further, he said that he arrived at the scene before the vehicles were moved.

15. On cross examination, he denied that he was reading facts from somewhere and said that they had the information in the OB. He said that he had not produced the OB and sketch map because the proceedings were virtual and that he needed to come to court with the OB and file. He said that he witnessed the towing of the vehicles but the victims had been removed. He conceded that he did not witness the collision as he was not there.

16. In re-examination, he testified that the OB entry is indicated in the abstract produced in court. That upon his arrival at the scene, he saw the state of the vehicles as they were not interfered with. That they also noted the skid marks. Further, he stated that the speed plan will show what happened even if it is 10 years ago and that is what they use to show who is to blame.

17. The plaintiffs closed their case at that juncture.

The defendants' case

18. DW1 was Sammy Morgan Karisa and he adopted his statement dated 15th March 2022 as his evidence in chief. He stated that at the time of the accident, he was the turn boy of the subject motor vehicle and they were transporting goods headed to Mombasa along the Nairobi- Mombasa highway. At around Salama shopping centre area, the road was clear and the driver was driving straight in his lane. Suddenly, an oncoming motor vehicle driving at an excessive speed appeared overtaking and headed to their lane. The driver swerved to avoid the accident but due to the close proximity, the vehicles collided. He blamed the deceased for the accident for driving at an excessive speed in the circumstances and going towards their direction.

19. On cross examination, he said that the driver, Moses Kingee, disappeared and did not record a statement. He said that his evidence in court was the first time he was giving an explanation about the accident. That he had not said it to the police or to court.

20. In re-examination, he said that he recorded a statement in Mombasa and had now brought it to court.

21. The defendants' case was closed at that juncture.

22. Directions were given on the filing of submissions and the parties complied.

Submissions by the Plaintiffs

23. They filed their submissions through the firm of MNW & Advocates LLP.

24. They identified the issues for determination to be; who bears liability for the accident? and what is the quantum of damages payable?

25. With regard to liability, the plaintiffs basically reproduced the evidence of the witnesses which I have already done.

26. With regard to quantum, the plaintiffs submitted that they had produced exhibits and receipts to prove special damages of kshs 2, 795, 235/=.

27. With regard to general damages for pain and suffering, they submitted that since the deceased died on the day of the accident, a fair assessment would be Kshs. 75,000/=. They relied on Premier Dairy Limited –vs- Amarjit Singh Sagoo & Anor [2013] eKLR where the Court of Appeal upheld an award of Kshs. 75,000/= in respect of a deceased who died on the spot.

28. As for loss of expectation of life, they relied on Titus Ndung'u Njuguna & another –vs- Hannah Waruguru Gichuhi & another [2019] eKLR where a 53 year old deceased was awarded Ksh, 100,000/=. They urged the court to award a similar amount.

29. With regard to loss of future earnings and dependency, they submitted that the deceased left a widow and four children who depended on him. That his salary as an MCA was Ksh 500,000/= and would have continued serving until August 2022 when the country was scheduled to hold the General Election. Consequently, they submitted that there was a quantifiable loss of earnings for 15 months, being the period between June 2021 and August 2022, bringing it to a total of Ksh. 7,500,000/=.

30. Further, they submitted that the deceased served as a Banker with NCBA Bank Kenya Ltd where he earned a monthly net salary of Kenya Shillings Kshs. 300,000/= before vying and winning the MCA

seat. They contended that even if the Deceased had lost in the subsequent elections, he would have resumed his profession either at the same or higher level. They relied on Jacob Ayiga Maruja & Another –vs- Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR where the Court of Appeal observed that;

> "We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

31. They submitted that the fact of the deceased having been an MCA and a former employee of NCBA Bank was not disputed hence this honorable court should calculate his income for 15 months using a multiplicand of Ksh. 500,000/= and a multiplicand of Ksh 300,000/= for the other period. Relying on James Maluu Kiilu –vs- Lawrence Githinji & another [2015] eKLR, they urged the court to adopt a multiplier of 10 years. They illustrated their working as follows;

10 X 12 = 120 Months.

120 – 15 = 105 Months

15 x 500,000 = 7,500,000/=

105 x 300,000 = 31,500,000/=

31,500,000 + 7,500,000 = 39,000,000/=

2/3 x 39,000,000 = 26,000,000/=

32. With regard to costs, they relied on Reid, Hewitt & Co –vs- Joseph (AIR 1918 Cal 717) and Myres –vs- Defries [1880] 5 Ex D 180 for the submission that costs follow the event.

Submissions by the Defendants

33. They filed their submissions through the firm of Wanyaga & Njaramba Advocates.

34. They identified the issue for determination to be; whether the defendant is liable, whether the plaintiff is entitled to the reliefs sought and if so to what extent; and who should bear the costs of the suit?

35. On liability, they submitted that the issue in a running down case invariably is who was the negligent party and therefore breached some duty of care. That for the plaintiff's claim to succeed, they must prove that the 2nd defendant was negligent and that as a result of the negligence the deceased suffered injuries that led to his death. They contended that the plaintiffs herein failed to prove the particulars of negligence pleaded in the plaint.

36. They submitted that the evidence of the investigating officer did not show how the accident happened and who was to blame and why. That he failed to provide the sketch maps and measurements as well as the Occurrence Book report which may have contained the facts of the accident. That he only produced the Police Abstract which did not give the facts of the accident. They relied on Amani Kazungu Karema –vs- Jackmash Auto Ltd & another [2021] eKLR quoting Calvin Grant v David Pareedon et al Civil Appeal 91 of 1987 where Theobalds J stated as follows; -

> " Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth."

37. They submitted that PW1 and 2 did not witness the accident and were therefore completely unaware of how it happened and who is to blame for it. Further, they submitted that their witness testified with precision as to how the accident happened and his evidence was not controverted. They relied on Samuel Kimani & another –vs- Mary Wanjiku Kamau & another [2019] eKLR where the Superior court overturned the decision held by the trial court by holding that the 2nd appellant being the duly authorised driver of the 1st appellant was not liable for the accident since the respondents had failed to prove negligence on his part. In determining who was to blame for the accident the court cited with approval the case of Kiema Muthungu –vs- Kenya Cargo Handling Service Ltd (1991)2 where it was held that: -

> " There can be no liability without fault and a plaintiff must prove some negligence on the part of the defendant where the claim is based on negligence."

38. The defendants also relied on Statpack Industries –vs- James Mbithi Munyao Nairobi [2005] e KLR in which it was stated that: -

> " It is trite law that the burden of proof of any fact or allegations is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which on a balance of probability a connection between the two may be

drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."

39. They submitted that being the affected party, the plaintiff has a duty to place before court evidence to sustain the averments made in his plaint. They relied on Alfred Kioko Muteti –vs- Timothy Miheso & Anor [2015] eKLR where the Superior Court held that pleadings were not evidence and it was not enough to plead particulars of negligence and to make no attempt through testimony to demonstrate how the accident occurred and how the 1st Defendant was to blame for it.

40. They contended that the plaintiffs cannot redeem their case through submissions as in Daniel Toroitich Arap Moi & another –vs- Mwangi Stephen Murithi & Anor [2014] eKLR where the Court of Appeal held as follows:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

41. Consequently, they submitted that no material had been placed before court upon which liability on the part of the 2nd defendant can be founded. They urged the court to dismiss the suit.

42. As to whether the plaintiffs are entitled to the reliefs sought, they answered in the negative for the reason that negligence had not been proven. However, they proceeded to submit on quantum since the court is required to rule on it regardless of the finding on liability.

43. On Pain and suffering, they submitted that Ksh. 10,000/= is sufficient compensation as the deceased died on the spot. They relied on Benedeta Wanjiku Kimani –vs- Changwon Cheboi & Another [2013] eKLR where Emukule J aptly explained the jurisprudence on loss of expectation of life and pain and suffering as follows:

> " The generally accepted principle is that very nominal damages will be awarded on this head of claim if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged."

44. They also relied on Moses Koome Mithika & Another –vs- Doreen Gatwiri & Another (Suing as the legal representative and Administrator of the Estate of Phineas Murithi (deceased) [2020] eKLR where the High Court awarded Kshs. 10, 000/- for pain and suffering where the deceased died on the spot.

45. On loss of expectation of life they submitted that a sum of Kshs. 100,000/= is sufficient compensation and relied on Lucy Wambui Kohoro –vs- Elizabeth Njeri Obuong [2015] eKLR and Makano Makonye Monyanche –vs- Hellen Nyangena [2014] eKLR where it was held:

> " I find no reason to interfere with the award on loss of expectation of life under the *Law Reform Act* as the same is always awarded at Kshs. 100,000/- across the board and the same was eventually deducted to avoid double award to same beneficiaries."

46. Further, they relied on Omar Sharif & 2 Others –vs- Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased [2020] eKLR where the court awarded Kshs 100,000/= for loss of expectation of life.

47. On Loss of dependency, they submitted that the plaintiffs did not provide any evidence to prove the earnings of the deceased. They contended that in claims for loss of dependency under the *Fatal Accidents Act*, courts have as a rule taken one third of the deceased's net income as his living expenses and two thirds of his net income as a dependency rule and as such, courts must be certain as to what the net income of the deceased was to be able to compute damages to be awarded under this head.

48. They submitted that in instances where the plaintiff has failed to produce evidence as to the earnings of the deceased, the court can be guided in computation by awarding a global sum as it deems fit. They urged this court to be guided by the following cases;

a. Mwanzia –vs- Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa -vs- Gichumu Githenji Nku HCCA No.15 of 2003 [2007] e KLR where the court observed that;

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

b. Moses Mairua Muchiri –vs- Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] e KLR where the court held that;

> " It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."

c. Mary Wanjiru Maina (Suing as Administrator Ad Litem of the Estate of the late Jane Wanjiru Maina v Lilian W. Macharia & another [2019] eKLR quoting with approval the case of Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993 held that:

> " In adopting a multiplier the Court has regard to such personal circumstances of the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are

unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.

49. They submitted that an award be computed using a global sum of Ksh. 1,500,000/= and relied on Ainu Shamshi Hauliers Limited –vs- Moses Sakwa & Another (Suing as the Administrators of the estate of Ben Siguda Okach (Deceased) [2021] eKLR where a global sum of Ksh 2,000,000/= was awarded for the death of a 40-year-old man who left behind a 29 year old wife and two young children aged 6 and 4 years. That the said award was upheld on appeal as the court was of the opinion that the award was not inordinately high based on the young family the deceased left behind.

50. They submitted that in our case, the deceased left behind a 51-year-old widow and four children three of whom have attained the age of majority.

51. As for Special Damages, they submitted that the award should only be made if proved by way of receipts. They relied on Hahn –vs- Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717 & 721 where the Court of Appeal held that;

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

52. As for costs, the defendants submitted that they follow the cause and since they are not liable for the accident, costs should be awarded to them.

53. Having looked at the pleadings, evidence on record and the rival submissions, it is my considered view that the issues for determination are;

    a. Who bears liability for the accident?

    b. What quantum of damages (if any) should be awarded?

    c. What orders should be given on costs?

Analysis and Determination

Liability

54. The fact that an accident occurred on the material day between the Shacman Truck and Toyota Land Cruiser is not in dispute. PW1 did not witness the accident hence could not testify on how it occurred. PW2 went to the scene after the accident had already happened and his evidence was that the Shacman Truck was overtaking a line of motor vehicles when it collided with the Toyota Land Cruiser. He said that the vehicles were still at the scene when he arrived and he witnessed them being towed. On the other hand, DW1 was present during the impact as he was the turn boy of the Shacman Truck. His evidence was that it was the deceased who got into their way as he was overtaking.

55. According to the evidence, the two vehicles were on opposite lanes of the Mombasa-Nairobi highway. The Toyota Land Cruiser was from the Mombasa direction and the Shacman Truck was from the Nairobi direction. The plaintiffs' version is that the accident happened on the deceased's lane because the Shacman Truck was overtaking a line of vehicles. The defendants' version is that the accident happened on the lane of the Shacman Truck because the deceased was overtaking. These are two

conflicting versions and I am of the view that the stalemate could have been sorted if the investigating officer (IO) had availed the sketch map. Indeed the record shows that the IO testified virtually but that cannot be the reason as to why the map was not availed for the courts benefit. In fact, there is no explanation as to why it was not included in the list of documents.

56. The police abstract indicates that there was a charge of causing death by dangerous driving against the Shacman Truck driver but that statement on its own does not shed light on how the accident happened. The fact that the driver fled also means that prosecution was not done and culpability was not established. As it is therefore, the evidence is not sufficient to assist the court in determining the party that was negligent. In Lakhamshi –vs- Attorney General, (1971) E A 118, 120 Spry V P rendered himself thus;

> " It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties wereCguilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident."

57. Similarly, in Farah –vs- Lento Agencies [2006] 1 KLR 124, 125 the Court of Appeal held that;

> " 4. The trial court had two conflicting versions of how the accident occurred. It was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident.
>
> 5. Where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was equally to blame."

58. From the foregoing authorities, and it is clear that on the facts as presented by each side, the police did not investigate the case, none of the plaintiffs were present. As a result there is no clear evidence as to who was to blame, save for each side pointing fingers at the other.

59. The police had a duty to present all the evidence at the scene but the impression created by PW2 is that they did nothing other than enter the accident in the OB. They took no sketch plan, no photos, and did not testify as to the efforts made to find the driver. Hence the only way out is for the parties to share liability at 50:50.

Quantum

Under the *Law Reform Act*

60. On pain and suffering, the plaintiffs proposed 75,000/= while the defendants proposed 10,000/=. The evidence is that the deceased died on the spot and was taken directly to the morgue. I find relevance in the words of Majanja J. in Sukari Industries Limited –vs- Clyde Machimbo Juma; Homa Bay HCCA NO. 68 of 2015 [2016] eKLR where he stated that;

> "(5) 5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years....."

61. From the foregoing and without evidence of the state of the deceased after the accident, I find the proposed award of Ksh 75,000/= fair under this head.

62. As for loss of expectation of life, both parties proposed Ksh 100,000/= and I find no reason to change that.

Under the *Fatal Accidents Act*

63. With regard to loss of dependency, the plaintiffs adduced evidence showing that the deceased was a member of the Makueni County Assembly. They however for reasons known to themselves did not disclose his pays lip. The defendants urged this court to award a global sum because the plaintiffs did not tender the deceased's pay slip to prove his earnings despite pleading that his monthly net salary was Ksh 500,000/=. However, the remuneration of an MCA is in the public domain and I will therefore resort to Gazette Notice No. 3987 of 07th July 2017 which indicates the gross monthly pay as Ksh 144,375/=.

64. The plaintiffs produced P.Ex 6 which is a document from Makueni County Assembly showing that the deceased was a member of two committees and a chairman of one to wit; Devolution & Public Service (chairman), Finance & Social Economic Planning and County Budget & Appropriations Committees. In this regard, the Gazette Notice provides as follows; County Assembly Committee Sitting Allowance

    A State Officer in the County Assembly who serves in Committees shall be paid Committee Sitting Allowance as follows;

    a. Chairperson: Ksh 5,000/= per sitting subject to a maximum of sixteen (16) payable sittings per month (upto a maximum of Ksh 80,000 per month).

    b. Member: Ksh 3,000/= per sitting subject to a maximum of sixteen (16) payable sittings per month (upto a maximum of Ksh 48,000 per month).

65. No evidence was led to establish that the deceased had sat in any committee sittings or earned any money from committee sittings . The fact that evidence was available to show that he was a member of these committees there ought to have been evidence of the settings of the committees.

66. Consequently, his gross monthly pay would be Ksh 144,375.

67. 5 is a letter dated 14th July 2021 from the Loans Committee of the County Assembly indicating that the deceased was not servicing any loan as at February 2021. That means that at the time of his death in June 2021, the probable deductions were income tax (PAYE) and NHIF.

68. According to the Kenya Revenue Authority Website, the tax rate for amounts over Ksh 32,333/= monthly was 30% (43,312.5). As for NHIF, the rate applicable for a gross income of 100,000/= and above was Ksh 1,700/=. The net monthly income for the deceased was therefore; Ksh 144,375 – (43,312.5 + 1,700) = 99, 362.5/=.

69. Counsel plaintiffs proposed a multiplier of 10 years but with two sets of earnings. The plaintiffs argued that prior to becoming an MCA, the deceased was a banker at NCBA Bank Kenya Ltd earning a monthly net salary of Ksh 300,000/= and this ought to be used to calculate another set of income for the deceased. They argued further that the deceased's occupation as a banker was not controverted. However, the adage that he who alleges must prove is applicable as provided for by s. 107 of the *Evidence Act*. In the statement of defence, all the averments in the plaint were denied parties joined issues and it was up to the plaintiffs to establish the alleged income as a banker. It was also not clear what the deceased's profession was before he joined politics.

70. An assessment of loss of dependency entails an aspect of loss of future income by the deceased that would have been used to support the dependants. This is based on so many presumptions; the greatest being that the deceased would have lived to a certain age, he would have had the earning capacity, and the earnings would have been a certain amount and he would have used those earnings to support the defendants.

71. The deceased was survived by a widow and four children as per the birth certificates (P.Ex 12). The plaintiffs exhibited school fees receipts (P.Ex 13) showing that the first and third born were pursuing their university education while the last born was in primary school. The second born was not accounted for. The receipt for Daystar University is for Ksh 102,000/=, the one for Strathmore University is for Ksh 500,000/= and the one for St. Hannah Preparatory School is for Ksh 65,000/=. The deceased's wife testified that she was unemployed and relied on the deceased as the sole breadwinner. However, no evidence was produced to demonstrate the income of the deceased.

72. The defendants only submitted on the global award and proposed 1.5M. In the cited case the deceased was a tuk tuk driver whose income was not known. In this case the earnings of the deceased are known and there lies the difference. The only complication is that the earning was pegged to a political career that depends on the election by the people. The court can make the presumption that the deceased could have won another term as MCA. He was 53. Had he completed his first term he would have been 55. A second term would have ended at 60. This would give us a multiplier of 7 years. At Ksh 99, 362.5/= that would be 99, 362.5x7x12=8,346, 450

73. With regard to special damages, the receipts exhibited amount to Ksh 1,009, 830/=. The plaintiffs did not produce an assessment report to show that the damage to the Toyota Land Cruiser was assessed at Ksh 1,500,000/=. It is trite that special damages must be specifically pleaded and proved.

74. In my view, the plaintiffs' claim succeeds to the extent discussed and the working is as follows;

    Liability 50%:50%

    Pain & suffering.....Ksh 75,000/=

    Loss of expectation of life.....Ksh 100,000/=

    Loss of dependency.....Ksh 8,346, 450/=

Special damages.....Ksh 1,009, 830/=

Total..... Ksh 9, 531, 280/=

Less 50% contribution..... Ksh 4,765 640/=

Total Award..... ...Ksh 4,765 640/=

75. The plaintiffs will have the costs of the suit plus interest at court rates.

76. Right of Appeal 30 days

DATED AND SIGNED THIS 23RD DAY OF FEBRUARY 2024

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MUMBUA T MATHEKA

JUDGE

DELIVERED VIA EMAIL THIS 23RD DAY OF FEBRUARY 2024.

CA NELIMA

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